

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE DISTRICT OF PUERTO RICO

3                   LUZ SANCHEZ PIÑERO,

4                   Plaintiff,

5                   v.

6                   DEPARTMENT OF HOUSING AND URBAN  
7                   DEVELOPMENT, et al.,

8                   Defendants.

CIVIL NO. 08-1374 (RLA)

10                  **ORDER GRANTING MOTION TO DISMISS AND**  
11                  **DENYING MOTION TO SET ASIDE PARTIAL JUDGMENT**  
12                  **AND MOTION TO REMAND**

13                  Currently before the court for disposition are plaintiff's  
14                  Motion to Set Aside Partial Judgment (docket No. 35), the federal  
15                  defendant's Motion to Dismiss (docket No. 46) and plaintiff's request  
16                  for remand (docket No. 52).

17                  The court having reviewed the arguments presented by the parties  
18                  as well as the evidence on record hereby disposes of the outstanding  
19                  motions as follows.

20                  **I. PROCEDURAL BACKGROUND**

21                  This action arose due to plaintiff's damages allegedly resulting  
22                  from her fall due to a slippery substance while walking down the  
23                  stairs at the V&B Apartments in Barceloneta, Puerto Rico.

24                  Named defendants to the complaint were: United States DEPARTMENT  
25                  OF HOUSING AND URBAN DEVELOPMENT ("HUD") and EXCELLENCE MANAGEMENT  
26                  AUDITS AND REALTY, CORP. ("EMARCO").

27                  The claims asserted against HUD are premised on the Federal Tort  
28                  Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680 whereas EMARCO's

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2 liability is based on negligence as provided for in art. 1802 of the  
3 Puerto Rico Civil Code, P.R. Laws Ann. tit. 31, § 5141 (1990).

4 On September 10, 2008 (docket No. 33), the court issued a  
5 partial judgment dismissing the claims asserted against codefendant  
6 EMARCO as time-barred.<sup>1</sup>

7 Plaintiff has moved the court to set aside EMARCO's dismissal  
8 arguing that this action is not time-barred inasmuch as defendants to  
9 these proceedings are joint tortfeasors and the administrative claim  
10 submitted to HUD on April 3, 2007 pursuant to 28 U.S.C. § 2675(a)  
11 tolled the statute of limitations as to both.

12 Subsequently, HUD petitioned dismissal of the claims asserted  
13 against it. Plaintiff did not oppose HUD's motion but rather, she  
14 concurred with the arguments set forth by the federal defendant in  
15 support of the dismissal and requested instead remand of the claims  
16 asserted against EMARCO to the state court.<sup>2</sup>

17 Because we find the arguments advanced by HUD in its motion to  
18 dismiss dispositive of the issues set forth by plaintiff in support  
19 of her motion to vacate EMARCO's partial judgment, we shall address  
them first.

20 **II. MOTION TO DISMISS**

21 First, we must note that the United States of America is the  
22 sole proper party defendant in an action based on negligence filed  
23 under the FTCA. Roman v. Townsend, 224 F.3d 24, 27 (1<sup>st</sup> Cir. 2000).

24 \_\_\_\_\_  
25 <sup>1</sup> The court further found that there was no *in personam*  
jurisdiction over this codefendant.

26 <sup>2</sup> See Motion in Compliance (docket No. 52).

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2 Thus, plaintiff may not prosecute her negligence claim directly  
3 against HUD.

4 The United States, as a sovereign, is immune from suit unless it  
5 waives its immunity by consenting to be sued. See, United States v.  
6 Mitchell, 463 U.S. 206, 212, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983)  
7 ("It is axiomatic that the United States may not be sued without its  
8 consent and that the existence of consent is a prerequisite for  
9 jurisdiction."); Bolduc v. United States, 402 F.3d 50, 55 (1<sup>st</sup> Cir.  
10 2005) (United States immune except to extent it waives its immunity);  
11 Dynamic Image Tech., Inc. v. United States, 221 F.3d 24, 39 (1<sup>st</sup> Cir.  
12 2000) ("As a sovereign nation, the United States is immune from  
13 liability except to the extent that it consents to suit."); Day v.  
14 Massachusetts Air Nat'l Guard, 167 F.3d 678, 681 (1<sup>st</sup> Cir. 1999)  
15 ("[a]s sovereign, the United States may not be sued for damages  
16 without its consent.") Limitations to the sovereign immunity of the  
17 United States such as the FTCA must be strictly construed and are not  
18 subject to waiver. Patterson v. United States, 451 F.3d 268, 270  
(1<sup>st</sup> Cir. 2006); Dynamic Image Tech., 221 F.3d at 39.

19 The FTCA waives the sovereign immunity of the United States "in  
20 the same manner and to the same extent as a private individual under  
21 like circumstances." See, Sosa v. Alvarez-Machain, 542 U.S. 692, 700,  
22 124 S.Ct. 2739, 159 L.Ed.2d 718 (2005) (FTCA designed to remove  
23 immunity from torts similar to private individuals); Santoni v.  
24 Potter, 369 F.3d 594, 602 (1<sup>st</sup> Cir. 2004) ("[FTCA] provides a limited  
25 congressional waiver of the sovereign immunity of the United States  
26 for torts committed by federal employees acting within the scope of

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2 their employment [similar to private parties in similar  
3 circumstances]"); Roman v. Townsend, 224 F.3d 24, 27 (1<sup>st</sup> Cir. 2000)  
4 ("FTCA waives the sovereign immunity of the United States with  
5 respect to tort claims").

6 Pursuant to the FTCA, the United States is liable for the  
7 negligence of its employees. Government employees are defined as  
8 "officers or employees of any federal agency." 28 U.S.C. § 2671.  
9 Federal agencies in turn are "instrumentalities or agencies of the  
10 United States but does not include any contractor with the United  
11 States." *Id.*

12 Hence, it is axiomatic that the federal government will not be  
13 liable for the negligence of independent contractors. United States  
14 v. Orleans, 425 U.S. 807, 96 S.Ct. 1971, 48 L.Ed.2d 390 (1976); Logue  
15 v. United States, 412 U.S. 521, 93 S.Ct. 2215, 37 L.Ed.2d 121 (1973);  
16 Larsen v. Empresas El Yunque, Inc., 812 F.2d 14 (1<sup>st</sup> Cir. 1986);  
17 Brooks v. A.R. & S. Enterprises, Inc., 622 F.2d 8, 10 (1<sup>st</sup> Cir. 1980).

18 An independent contractor relationship exists in situations  
19 where the United States does not have the authority to control the  
20 contract's performance. Logue, 412 U.S. at 523. In this vein, the  
21 determining factor is, "whether the United States directs the manner  
22 in which the contractor carries out its obligations under the  
23 contract." Brooks, 622 F.2d at 11. The "key question [is] 'whether  
24 the day-to-day operations of the agency were supervised by the  
25 Federal Government.'" Larsen, 812 F.2d at 15 (quoting Orleans, 425  
26 U.S. at 815). "If day-to-day control over the contractor exists, the  
United States is liable for injuries caused by the negligence of the

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2 contractor's employees. We must determine, therefore, whether the  
3 United States maintained sufficient control over the daily operations  
4 of [the independent contractor] to subject the government to  
5 liability for the negligence of [the independent contractor's]  
6 employees". Brooks, 622 F.2d at 10-11.

7 It is important to note, however, that "[t]he right to inspect  
8 does not nullify the general rule that the government is not liable  
9 for torts of independent contractors." Larsen, 812 F.2d at 15  
10 (quoting Brooks, 622 F.2d at 12). See also, Perez v. United States,  
11 594 F.2d 280, 287 (1<sup>st</sup> Cir. 1979).

12 In this case it stands undisputed that at all times relevant HUD  
13 had no interest in or control over the V&B Apartments. It did not  
14 provide rental subsidies or any other financial assistance to the  
15 property where the alleged incident occurred. Additionally, HUD was  
16 not the financier or insurer of the mortgage securing the V&B  
17 Apartments.

18 In other words, the V&B Apartments were not owned by HUD; were  
19 not under its control, and do not fall under HUD's regulatory  
20 jurisdiction. Consequently, HUD did not have any control or  
21 jurisdiction over the accident site. As such, HUD is not liable for  
22 the alleged lack of illumination of the area nor any purported  
23 dangerous condition which caused plaintiff's fall.

24 Additionally, in its motion to dismiss the federal defendant  
25 notes that the United States DEPARTMENT OF AGRICULTURE, RURAL  
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2 DEVELOPMENT ("RD"), does have an interest in the V&D Apartments.<sup>3</sup>  
3 However, it is uncontested that RD's interest does not include the  
4 supervision of the daily operations and maintenance of the apartment  
5 complex at issue.

6 As correctly pointed out by the Government, federal funding and  
7 the right to inspect to ensure compliance with a federal contract  
8 terms and conditions does not render the United States liable for the  
9 negligent acts or omissions of an independent contractor. Further, in  
10 this case, the Government's position that RD was not responsible for  
11 the day to day operations or maintenance of the physical facilities  
12 comprising the V&B Apartments is unchallenged.

13 Accordingly, the Motion to Dismiss filed by the United States of  
14 America (docket No. 46) is **GRANTED** and the claims asserted against  
15 HUD are hereby **DISMISSED**.

### 16 III. MOTION TO SET ASIDE PARTIAL JUDGMENT

17 Plaintiff has moved the court to set aside the Partial Judgment  
18 issued on September 10, 2008 (docket No. 33) dismissing the claims  
19 asserted against codefendant EMARCO as time-barred. In essence,  
20 plaintiff avers that she tolled the limitations period by means of an  
21 extrajudicial claim submitted to the United States, EMARCO's alleged  
joint tortfeasor.

22 In its opposition to plaintiff's request, EMARCO raises two  
23 separate arguments in support of the validity of the Partial

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25       <sup>3</sup> V&B Apartments is a rental housing project financed by a  
26 direct government loan from the Rural Rental Housing Program,  
42 U.S.C. § 1485. It also receives rental assistance payments under  
the Rental Assistance Program, 42 U.S.C. 1490a.

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3 Judgment. First, codefendant contends that any entreaties made to the  
4 United States did not have any tolling effect on the claims asserted  
5 against it. Additionally, EMARCO argues that plaintiff having twice  
6 moved for voluntary dismissal of her suits she is now precluded from  
7 filing yet a third complaint.

8 The following summarizes the relevant events for purposes of the  
9 statute of limitations in this case:

10 **1/22/06** Plaintiff's accident.

11 **3/16/06<sup>4</sup>** Complaint filed in state court.

12 **5/18/06** Case removed to federal court.

13 **5/26/06** Plaintiff's request for voluntary dismissal in federal  
14 case.

15 **5/30/06** Judgment dismissing federal case upon plaintiff's  
16 request for voluntary dismissal.

17 **\*\*\*** Plaintiff's request for voluntary dismissal in state  
18 court case.

19 **9/27/06** Judgment dismissing state court case upon plaintiff's  
20 request for voluntary dismissal.

21 **4/3/07** Plaintiff submitted administrative claim to HUD.

22 **9/24/07** Plaintiff's claim letter to EMARCO.

23 **9/28/07** HUD denied plaintiff's administrative claim.

24 **3/28/08** Instant complaint filed.

25 <sup>4</sup> The complaint was stamped twice by the Clerk of the Court, once  
26 on March 16, 2006 and the other on March 23, 2006. However, for purposes  
of this Order this difference is immaterial.

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4 **A. Twice Dismissed Rule**  
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6 According to the evidence before us, plaintiff's accident  
7 occurred on January 22, 2006, and plaintiff filed her initial  
8 complaint in the Manati state court on March 16, 2006 [CD06-332].  
9 Codefendant HUD removed the state action to federal court on or about  
10 May 8, 2006,<sup>5</sup> where it was assigned Civ. No. 06-1452. Thereafter, on  
11 May 26, 2006, plaintiff requested voluntary dismissal of the federal  
12 suit. Judgment of dismissal was entered on May 30, 2006, pursuant to  
13 Rule 41(a)(1) Fed. R. Civ. P.

14 At some point plaintiff also requested dismissal of the Manati  
15 proceedings which the local court granted without prejudice on  
16 September 27, 2006, pursuant to P.R. Civ. P. Rule 39.1(a)(1).

17 Codefendant raises the "two-time filing" rule which provides  
18 that a voluntary dismissal filed pursuant to Rule 41(a)(1) (A) Fed. R.  
19 Civ. P. is without prejudice "[b]ut if the plaintiff previously  
20 dismissed any federal-or-state-court action based on or including the  
21 same claim, a notice of dismissal operates as an adjudication on the  
22 merits."<sup>6</sup>

23  
24 Thus, the relevant inquiry for purposes of this Order is whether  
25 Manati case CD06-332 and the removed action, i.e., Civ. No. 06-1452,  
26 are two separate suits or should be deemed only one for purposes of  
the "twice dismissed" rule.

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25     <sup>5</sup> See Notice of Removal (docket No. 1) in Civ. No. 06-1452.

26     <sup>6</sup> P.R. Civ. P. Rule 39.1(a)(2) essentially provides the same.

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2 Removal to the federal court merely entails continuation of the  
3 original suit in a different forum based on the complaint initially  
4 filed in state court. "After removal of an action from state court,  
5 the federal district court acquires full and exclusive subject matter  
6 jurisdiction over the litigation. The case will proceed as if it had  
7 been brought in the federal court originally." 14C Charles Alan  
8 Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and  
9 Procedure § 378 p. 390 (3d ed. 1998).

10 Based on the foregoing, we must conclude that both the state and  
11 federal removal actions are but the continuation of one. Accordingly,  
12 EMARCO's argument for dismissal based on the twice dismissed  
13 provision established in Rule 41(a)(1)(A) is found inapposite to the  
14 situation at bar.

15 **B. Timeliness**

16 In Puerto Rico, the applicable period for instituting actions  
17 sounding in tort is one year as provided for in P.R. Laws Ann. tit.  
18 31, § 5298 (1990). This term may be tolled either via: (1) judicial  
19 proceedings, (2) extra-judicial claims, and (3) acknowledgment of the  
debt by the person liable. § 5303.

20 **(I) Judicial Proceedings**

21 As previously noted, pursuant to § 5303 one of the options  
22 available for tolling the one-year limitations period is by  
23 instituting judicial proceedings. The tolling takes effect by the  
24 mere filing of the complaint - without regard to service of process  
25 or the fact that the court may eventually be found to lack  
26 jurisdiction - and lasts until the judicial proceedings have come to

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2 an end. Martínez Arcelay v. Peñaigaricano, 145 D.P.R. 93 (1998);  
 3 Agosto v. Municipio de Rio Grande, 143 D.P.R. 174 (1997); Durán-  
 4 Cepeda v. Morales-Lebrón, 112 D.P.R. 623 (1982); Moa v. Commonwealth,  
 5 100 P.R.R. 572, 589 (1972).

6 Once the judicial proceedings have concluded<sup>7</sup> the full one-year  
 7 term will commence to run anew. De León Crespo v. Caparra Center, 147  
 8 D.P.R. 797 (1999); Silva-Wiscovich v. Weber Dental Mfg. Co., 119  
 9 D.P.R. 550 (1987); Durán-Cepeda. See also, Rodríguez Narvaez v.  
 10 Nazario, 895 F.2d 38, 43 (1<sup>st</sup> Cir. 1990).

11 **(ii) Extra Judicial Claims**

12 It is plaintiff's burden to establish the adequacy of an extra-  
 13 judicial claim which complies with the pertinent legal requirements.  
 14 González Rodríguez v. Wal-Mart, Inc., 147 D.P.R. 149 (1998). See  
 15 also, Acosta Quiñones v. Matos Rodríguez, 135 D.P.R. 668, 675 (1994)

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17 <sup>7</sup> The Puerto Rico Supreme Court has determined that in those  
 18 particular instances wherein plaintiff voluntarily desists from his claim  
 19 pursuant to P.R. R. Civ. P. Rule 39.1(a)(1) - before the opposing party  
 20 has answered the complaint or filed a summary judgment request - the new  
 21 limitations period will run from that date and not from the date when  
 22 pertinent judgment is issued by this court. This is so because at that  
 23 particular point in the proceedings the plaintiff still has an  
 24 unconditional right to withdraw his claim. Thus, in cases falling within  
 25 the provisions of Rule 39.1(a)(1) the judgment acknowledging plaintiff's  
 will is a mere formality.

26 [T]he filing of the notice of dismissal with the court puts an  
 27 end to the litigation and, thus, is the date on which a new  
 28 period of limitations begins to run. The unequivocal expression  
 29 of the intent to dismiss the action conclusively determines  
 30 that the interruptive effect of the judicial action ceased.  
 31 Subsequent events, such as the date on which the court renders  
 32 judgment, files and serves notice of the same, or the date on  
 33 which the judgment becomes final and unappealable, have nothing  
 34 to do with the effectiveness of said expression of intent and  
 35 are therefore totally irrelevant.  
Garcia Aponte v. Commonwealth of P.R., 1994 P.R.- Eng. 909243, 135 D.P.R.  
 137 (1994).

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3 (it behooves claimant to prove the extra-judicial claim by direct or  
4 circumstantial evidence).5 In order for extra-judicial claims to effectively toll the  
6 statutory period the demand must be made by the injured party or his  
7 representative to the person responsible for the damages, prior to  
8 the lapse of the statutory period, and must relate to the same cause  
9 of action alleged in the complaint. De León Crespo; González  
10 Rodríguez. The demand need not comply with any formal requirement.  
11 However, it must convey an unequivocal desire by an injured party not  
12 to lose a right when threatened to lose it. Acosta Quiñones, 135  
13 D.P.R. at 675 (quoting Zambrana Maldonado v. E.L.A., 129 D.P.R. 740,  
14 752 (1992)). That is, "it must require or demand the same conduct or  
15 relief ultimately sought in the subsequent lawsuit." Tokyo Marine and  
16 Fire Ins. Co., Ltd., 142 F.3d 1, 5 (1<sup>st</sup> Cir. 1998) (citing Rodriguez  
17 Narvaez, 895 F.2d at 44).18 **(iii) The Facts**19 We shall begin by examining the previous related judicial  
20 proceedings to ascertain whether or not they effectively tolled the  
21 applicable limitations period. However, in order to properly assess  
22 the potential tolling effect of these prior cases, we must first  
23 consider the nature of the removal process and its consequences on  
24 the underlying local proceedings.25 Once the party seeking removal has complied with all the  
26 necessary legal measures provided for in 28 U.S.C. § 1446, the local  
court is proscribed from acting any further in the state case.  
" [R]emoval is effected by the defendant taking three procedural

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2 steps: filing a notice of removal in the federal court, filing a copy  
3 of this notice in the state court, and giving prompt written notice  
4 to all adverse parties" Wright & Miller § 3737 p. 381, whereupon "the  
5 State court shall proceed no further unless and until the case is  
6 remanded." 28 U.S.C. § 1446(d).

7 Upon movant having met the aforementioned procedural  
8 requirements, "the state court is divested of jurisdiction... [and]  
9 must stop all proceedings unless and until the case is remanded. Any  
10 state action after the filing of the removal notice is void, even if  
11 the case is subsequently remanded... Further, the state court has no  
12 authority to act after a federal court dismisses rather than remands  
13 a case." 16 James Wm. Moore et al., Moore's Federal Practice - Civil  
14 ¶ 107.31.

15 Plaintiff's first complaint was filed in the Manati state court  
16 on March 16, 2006, well within the one-year limitations period.<sup>8</sup>  
17 However, upon the case being removed to the federal forum the local  
18 action vanished for all practical purposes and merged with Civ. No.  
19 06-1452. The Manati court had no authority to take any further action  
20 in CD06-332 once the United States perfected the removal process in  
21 May 2006. Hence, the judgment issued by the local court on September  
22 27, 2006, is void and could have had no valid tolling effect.

23 Based on the foregoing, even though we take the date of filing  
24 of the initial local complaint as the start of the tolling period,

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25  
26 <sup>8</sup> The accident occurred on January 22, 2006.

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2 the date when the federal removed proceedings concluded is the  
3 relevant one for purposes of when the tolling period ceased.

4 The removed federal action concluded in May 2006<sup>9</sup> and the instant  
5 suit was filed on March 28, 2008, that is, over one year subsequent  
6 thereto. This would render plaintiff's negligence claim against  
7 EMARCO stale unless plaintiff effectively tolled the limitations  
8 period via other means provided for in § 5303.

9 Plaintiff alleges that the administrative claim presented to HUD  
10 on April 3, 2007, as mandated by 28 U.S.C. § 2675(a), also operated  
11 as an extrajudicial demand with respect to EMARCO because both  
12 defendants are purportedly joint tortfeasors.

13 While it is true that pursuant to § 5304 tolling as to one  
14 tortfeasor will affect all other persons jointly liable for the  
15 damages, see, Tokyo Marine, in this case HUD<sup>10</sup> is not liable for the  
16 allegedly negligent circumstances propitiating plaintiff's fall.  
17 Specifically, based on the uncontested evidence on record, we have  
18 previously concluded in this Order that the federal government had no  
19 duty of care regarding the allegedly dangerous condition of the  
premises where plaintiff's unfortunate accident took place.

20 Thus, any extra judicial demands made upon the United States  
21 could have no possible tolling effect on codefendant EMARCO.

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24 <sup>9</sup> For purposes of our ruling, it is immaterial whether this period  
is calculated from the filing of plaintiff's voluntary dismissal request  
25 on May 26, 2006, or from the date when the corresponding Judgment was  
entered on May 30, 2006.

26 <sup>10</sup> Or any other federal agency for that matter.

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3 Plaintiff did forward EMARCO a letter on September 24, 2007.  
4 Assuming this correspondence complied with the prerequisites for a  
5 valid extra-judicial claim under § 5303, it was forwarded to EMARCO  
6 well beyond the one-year term plaintiff had available to prosecute  
7 her claim against codefendant which term commenced to run anew at the  
end of May 2006.

8 Based on the foregoing, we find that plaintiff's claim against  
9 EMARCO is time-barred.

10 **IV. REQUEST FOR REMAND**

11 Plaintiff conceded that no viable claim exists against HUD and  
12 petitioned the court for remand of the remaining cause of action  
13 against EMARCO. However, apart from the fact that the claims asserted  
14 against codefendant EMARCO are time-barred, remand is not a legally  
15 feasible option for plaintiff in these proceedings inasmuch as this  
case was initiated in the federal forum.

16 **V. CONCLUSION**

17 Based on the foregoing, it is hereby ORDERED as follows:

18 - The Motion to Dismiss filed by the United States of America  
19 (docket No. **46**) is **GRANTED** and the claims asserted against  
20 HUD are hereby **DISMISSED**. Judgment shall be entered  
21 accordingly.

22 - Plaintiff's Motion to Set Aside Partial Judgment (docket  
23 No. **35**)<sup>11</sup> is **DENIED**.

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26 <sup>11</sup> See Response in Opposition (docket No. **41**), Reply (docket No. **42**)  
and Sur-Reply (docket No. **43**).

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3 - Plaintiff's Motion in Compliance and Requesting Remand  
4 (docket No. 52)<sup>12</sup> is **DENIED**.

5 IT IS SO ORDERED.

6 San Juan, Puerto Rico, this 16<sup>th</sup> day of December, 2008.

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8 S/Raymond L. Acosta  
9 RAYMOND L. ACOSTA  
10 United States District Judge

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See Federal Defendant's Opposition (docket No. 53).